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Attorneys for Plaintiff Inicom Networks, Inc.

INICOM NETWORKS, INC., Individually and	:	Case No. C08 04332 PVT
on Behalf of All Others Similarly Situated,	:	
	:	
Plaintiff,	:	FIRST AMENDED COMPLAINT FOR
	:	UNLAWFUL, UNFAIR AND
vs.	:	FRAUDULENT BUSINESS PRACTICES;
	:	BREACH OF WARRANTIES; VIOLATION
	:	OF MAGNUSON-MOSS WARRANTY
NVIDIA CORP. et al.,	:	ACT, 15 U.S.C. §§ 2301 <i>et seq.</i> ; UNJUST
	:	ENRICHMENT; DECLARATORY RELIEF;
Defendants.	:	and DAMAGES
	:	
	:	
	:	CLASS ACTION
	:	
	:	
	:	DEMAND FOR JURY TRIAL

1 Plaintiff Inicom Networks, Inc. (“Plaintiff”) alleges the following upon information and
2 belief, except as to allegations concerning Plaintiff or its counsel, which are made upon
3 Plaintiff’s personal knowledge and are so identified.

4 INTRODUCTION

5 1. This is a class action brought by Plaintiff individually and on behalf of all
6 consumers who purchased, beginning four years prior to the commencement of this action and
7 continuing through the present, computers containing defective NVIDIA graphic controller chips
8 (the “Class Computers”), including computers manufactured by Hewlett-Packard, Dell, and
9 Apple. NVIDIA’s defective graphic chips cause consumers’ computers to fail, display corrupted
10 images, including distorted images, lines, garbled characters, artifacts, overheat, as well as
11 complete monitor/display failure.

12 2. There is no question the NVIDIA components in the Class Computers are
13 defective. Defendants NVIDIA and HP admit their graphic chips and computers are defective,
14 yet consumers are stuck with the defective computers: no replacements, no refunds, and no
15 compensation from defendants. Plaintiff purchased a defective Class Computer for personal use.

16 3. Defendant NVIDIA manufactured and sold graphics processing units (“GPUs”) and multichip packages (“MCPs”) to defendant HP for use in its desktop and notebook
17 computers. Other manufacturers like Dell and Apple also use NVIDIA graphics chips in certain
18 models of notebook computers. During the past four years, many of the notebook, and a portion
19 of desktop, computers these manufacturers sold to consumers contained defective NVIDIA
20 GPUs and MCPs, which cause many Class Computers to experience the video and graphics
21 problems described herein, as well as other problems, such as complete computer failure.

22 4. NVIDIA and HP have received thousands of consumer reports and complaints
23 about the graphics and video problems plaguing the Class Computers.
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6 6. Although Defendants admits their products are defective, Defendants have failed
7 to remedy the harm consumers have suffered by purchasing the defective Class Computers. An
8 NVIDIA spokesman recently stated, “the company [NVIDIA] would like to be more upfront
9 about this – but we can’t be. . . . [O]ur obligations to our partners limit what we can say. We
10 need to leave announcements to our partners like Dell and HP.”

7. What's more, Defendants are avoiding a necessary recall by recommending consumers download and install a BIOS "update," which spins the computer's fan more frequently or continuously. *See* paragraphs 32-36, *infra*. This grossly inadequate "remedy" actually results in additional manifest defects, including, without limitation, degraded battery life, system performance, and major noise in the defective computers. Worse, the "remedy" fails to solve the actual problem. Instead the stopgap measure helps ensure the Class Computers will fail *after* the warranty period expires, leaving consumers with a defective computer and no remedy at all. Finally, even after using defendants' "remedy," video and system performance is still degraded due to unacceptably high heat and part failures.

8. Defendants injured Plaintiff and other customers similarly situated throughout the country by misrepresenting the quality of the computers they were manufacturing, and by knowingly, recklessly or negligently selling defective computers to consumers. Defendants earned substantial profits from manufacturing and selling defective Class Computers.

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1 ratified by each other defendant, and together constitute a single and continuing course of
2 conduct.

3 **CLASS ACTION ALLEGATIONS**

4 16. Plaintiff brings this action individually and as a class action under Federal Rule of
5 Civil Procedure 23(b)(2) and (b)(3) on behalf of all persons and entities who purchased Class
6 Computers (the “Class”) at any time during the period beginning four years prior to the
7 commencement of this action and continuing through the present (the “Class Period”). The
8 Class excludes Defendants, their officers, employees, representatives, families, and the Court.

9 17. Class members are so numerous that joinder of all members is impracticable.
10 Thousands of individuals and entities bought Defendants’ defective computer products, and their
11 claims are similar to Plaintiff’s claims.

12 18. Plaintiff’s claims are typical of Class members’ claims, as Plaintiff and all Class
13 members were similarly injured by Defendants’ uniform sale of defective computers and
14 defective graphic chips, and the uniform misrepresentations about the quality of the
15 manufactured computers. Plaintiff and Class members have sustained injury and loss from
16 Defendants’ wrongful conduct.

17 19. Plaintiff will fairly and adequately protect the Class’s interests. Plaintiff’s claims
18 are coextensive with, and not antagonistic to, other Class members’ claims. Plaintiff is willing
19 and able to vigorously prosecute this action on the Class’s behalf, and Plaintiff has retained
20 competent and experienced counsel, all of whom satisfy Rule 23(g)’s requirements.

21 20. Common questions of law and fact exist as to all Class members and predominate
22 over questions that affect only individual Class members. Among the law and fact questions
23 common to the Class are whether:

- 24 (a) NVIDIA supplied computer manufacturers, including defendant HP, with
25 defective GPUs and MCPs for use in their computers;

- (b) NVIDIA's GPUs and MCPs failed at unacceptably high rates, were inherently defective, were not of merchantable quality, or would not pass without objection in the trade;
- (c) HP sold desktop and notebook computers that were inherently defective were not of merchantable quality, or would not pass without objection in the trade;
- (d) Defendants, by the misconduct set forth in this complaint, engaged in unfair, fraudulent or unlawful business practices with respect to the advertising, marketing and sale of these computers;
- (e) Defendants negligently, recklessly or willfully violated the law;
- (f) Class members are entitled to damages, and if so, how much; and
- (g) the Class is entitled to injunctive relief.

21. Plaintiff brings this action under Rule 23(b)(3) because the common questions of law and fact set forth above predominate over any issues that may be unique to individual Class members. In addition, the expense of litigating each Class member's claims individually would be so cost prohibitive as to deny Class members a viable remedy. Rule 23(b)(3) certification is appropriate because a class action is superior to the other available methods for the fair and efficient adjudication of this action, and Plaintiff envisions no undue difficulty in managing this litigation as a class action. Defendants would or should retain records of the computers that were manufactured with defective NVIDIA GPUs and MCPs. Notice of this action's pendency and any resolution thereof can be accomplished by a combination of publication and direct notice to those Class members whose names and addresses are on file with Defendants.

22. Plaintiff also brings this action under Rule 23(b)(2), because Defendants have acted or refused to act on grounds generally applicable to all Class members, thereby making final injunctive relief concerning the Class as a whole appropriate. Absent appropriate injunctive relief, Defendants will continue to operate their systematic scheme. Defendants' uniform conduct towards Plaintiff and other Class members makes certification under Rule 23(b)(2) appropriate.

FACTUAL ALLEGATIONS

23. Defendant NVIDIA manufactures and sells graphics processing units (the GPU) and multichip packages (the MCP). GPUs and MCPs are used in computers manufactured and sold by defendant HP and others, including Dell and Apple. Many of the computers HP sold during the Class Period contained defective NVIDIA GPUs and MCPs.

24. Despite receiving numerous reports their computers were experiencing video problems, until recently Defendants failed to disclose the unusually high failure rates of NVIDIA's GPUs and MCPs. On July 2, 2008 NVIDIA finally acknowledged the existence of defects in its GPU and MCP products. In a July 2, 2008 Form 8-K filed with the SEC, NVIDIA admitted:

On July 2, 2008, NVIDIA Corporation stated that it would take a \$150 million to \$200 million charge against cost of revenue to cover anticipated customer warranty, repair, return, replacement and other consequential costs and expenses arising from a weak die/package material set in certain versions of our previous generation MCP and GPU products used in notebook systems. All newly manufactured products and all products currently shipping in volume have a different and more robust material set.

The previous generation MCP and GPU products that are impacted were included in a number of notebook products that were shipped and sold in significant quantities. Certain notebook configurations of these MCP and GPU products are failing in the field at higher than normal rates. While we have not been able to determine a root cause for these failures, testing suggests a weak material set of die/package combination, system thermal management designs, and customer use patterns are contributing factors. We have developed and have made available for download a software driver to cause the system fan to begin operation at the powering up of the system and reduce the thermal stress on these chips. We have also recommended to our customers that they consider changing the thermal management of the MCP and GPU products in their notebook system designs. We intend to fully support our customers in their repair and replacement of these impacted MCP and GPU products that fail.

We have begun discussions with our supply chain regarding reimbursement to us for some or all of the costs we have incurred and may incur in the future relating to the weak material set. We will also seek to access our insurance coverage. We continue to not see any abnormal failure rates in any systems using NVIDIA products other than certain notebook configurations. However, we are continuing to test and otherwise investigate other products. There can be no assurance that we will not discover defects in other MCP or GPU products.

25. NVIDIA's announcement failed to specify which GPU and MCP products were defective. NVIDIA's failure to identify the defective models led some vendors to request graphics card manufacturers to recall desktop-based graphics cards using the same NVIDIA GPU chips.

26. In July 2008 HP admitted certain of its notebook computers contained defective hardware and published a list of the defective notebook computers. Included were systems in HP's Pavilion and Compaq Presario computer lines, including HP Pavilion models dv2000/dv6000/dv9000 and Compaq Presario series V3000/V6000 notebooks:

HP Pavilion notebook PC series

Compaq Presario notebook PC series

dv20xx	v30xx
dv21xx	v31xx
dv22xx	v32xx
dv23xx	v33xx
dv24xx	v34xx
dv60xx	v60xx
dv61xx	v61xx
dv62xx	v62xx
dv63xx	v63xx
dv64xx	v64xx
dv90xx	
dv92xx	
dv93xx	
dv94xx	

27. Recently, HP announced its "Pavilion Slimline Desktop PCs" also are affected by the problem. The models include the S3xx line of HP Slimline desktops.

28. Defendant HP listed symptoms that renders only some consumers "eligible" for a free repair. HP's website says:

If your computer's product number is listed above, and the notebook PC experiences one or more of the symptoms listed below, contact HP during the Duration of the HP Limited Warranty Service Enhancement to determine whether you are eligible for a free repair.

The following symptoms apply to Pavilion dv2000 and Presario v3000 notebooks:

- The notebook does not detect wireless networks and the wireless adapter is not detected in the Device Manager.
- There is no video on the computer LCD panel or external monitor.

The following symptoms apply to the dv6000, dv9000 and v6000 series notebooks:

- The notebook does not detect wireless networks and the wireless adapter is not detected in the Device Manager.
- There is no video on the computer LCD panel or external monitor.
- The notebook has no power and no active LEDs.
- The notebook does not start.
- The battery charge indicator light does not turn on when the battery is installed and the AC adapter is connected.
- The notebook issues a single beep during boot indicating no power.
- The external monitor functions but there is no image on the notebook LCD panel.

29. Defendant HP further announced a “Limited Warranty Service Enhancement” program for owners of the defective notebooks. On its website, HP sets forth consumer eligibility requirements for the limited warranty program:

If you own an HP Pavilion dv2000, HP Pavilion dv6000, HP Pavilion dv9000 or Compaq Presario V3000, Compaq Presario V6000 series computer, are experiencing no symptoms on your computer, and would like to obtain more information about updating your system to the new BIOS release, please go to the "Update the BIOS to the latest version" section on this page. If you are experiencing one or more symptoms listed below, and your computer meets the product criteria listed below, contact HP to determine whether you are eligible for a free repair.

NOTE: This service enhancement program is available in North America for 24 months after the start of your original standard limited warranty for issues listed below; otherwise your current standard limited warranty applies. Customers who already have a 24 month or longer warranty period will be covered under their existing standard HP Limited Warranty.

30. Similarly, for desktop computers HP provides a Slimline “Warranty Service Enhancement” – but only for computers that do not start or fail to display video. But HP does nothing to fix or otherwise replace the defective video components in the Slimline desktop computers. Worse, the “Enhancement” program ends December 2009. If an HP Slimline fails after December 2009, consumers are out-of-luck and will be left with a defective computer that either does not boot, does not display video, and will require repair to function as advertised by HP.

31. HP admits the defective NVIDIA products have been a warranty issue since at least November 2007.

32. HP’s Limited Warranty Service Enhancement program fails to address the defects in its desktop and notebook computers. The Limited Warranty Service Enhancement only applies to consumers whose computers are already malfunctioning – and malfunctioning in a limited, specific way. For all others who own HP’s defective Class Computers, HP merely offers consumers a “BIOS” update.¹ The update fails to repair or replace the defective components and unlawfully shifts repair responsibilities to the Class.

33. The BIOS update itself is fraught with complications, causes new or additional problems and merely is a temporary band-aid meant to forestall the manifestation of major problems. HP admits:

The new BIOS release for your notebook PC is preventative in nature to reduce the likelihood of future system issues. The BIOS updates the fan control algorithm of the system, and turns the fan on at low volume while your notebook PC is operational.

34. HP’s BIOS update causes the computer notebook’s fan to run continuously. Although the BIOS update may lower the thermal stress on the defective NVIDIA components,

¹ “BIOS” stands for Basic Input Output System. The BIOS is computer instruction code, embedded in the computer’s hardware, that assists in identifying and initializing the computer’s component hardware.

1 by running the system fan constantly customers experience a decrease in battery life, increase in
 2 system noise, and decrease in computer notebook life – manifesting further defects in the already
 3 defective notebook computers.

4 35. The purported BIOS “fix” is no fix at all. The BIOS fix does nothing to repair or
 5 replace the defective graphics chips. Instead the BIOS “fix” degrades the functionality of the
 6 defective notebooks. And the “fix” merely creates a different manifestation of problems in
 7 notebook computers past the warranty period.

8 36. Notably, HP excludes from its Limited Warranty Service Enhancement program
 9 defective notebook computers that have yet to exhibit one of the specified symptoms.
 10 Consumers who bought these defective computers are ineligible for free repairs and cannot
 11 exchange their defective notebooks for functional, as-advertised, defect-free computers. As
 12 stated on the company’s website:

13 If my notebook is not experiencing any of the symptoms described in the support
 14 article but is part of the program because it is a listed notebook in the Product
 Numbers Included document can I call HP to obtain a free repair?

15 **No.** Only notebooks that are experiencing one or more of the symptoms described
 16 in the support article are eligible for a free repair.

17 37. Yet customers may experience this defect but not know the cause, or install the
 18 BIOS update and have the defect manifest itself in a different way.

19 38. HP’s Slimline desktop warranty “Enhancement” suffers from the same flaw.
 20 Consumers who purchased these defective Slimline desktop PCs are ineligible for free repairs
 21 and cannot exchange their defective desktops for functional, as-advertised, defect-free
 22 computers. As stated by HP on its website:

23 My HP Pavilion Slimline desktop computer is working fine, but is listed in the table
 above. What should I do now?

24 The HP Limited Warranty Service Enhancement is **only** for products that have exhibited
 25 the symptoms described above, and for which these symptoms are attributable to their
 motherboards. Computers returned to HP that do not have these symptoms and are not

1 within the period of the HP Limited Warranty Service Enhancement, will be handled like
 2 any other product returned for service: if no repair is needed, it will be **returned** to the
 3 customer; if a repair is needed, it will be repaired per the terms of HP's Hardware
 4 Limited Warranty.

5 39. On or about July 25, 2008, another computer manufacturer, Dell, admitted its
 6 notebook computers containing NVIDIA GPUs and MCPs were experiencing defects and
 7 published a list of faulty notebooks. The hardware defects have affected Dell's Inspiron,
 8 Latitude, Precision, Vostro, and XPS product lines. To date, Dell has admitted the following
 9 notebook models are defective:

Dell Product Name

10 Inspiron 1420
 11 Latitude D630
 12 Latitude D630c
 13 Precision M2300
 14 Vostro Notebook 1310
 15 Vostro Notebook 1400
 16 Vostro Notebook 1510
 17 Vostro Notebook 1710
 18 XPS M1330
 19 XPS M1530

20 40. In a July 25, 2008 blog post, published on its "Direct2Dell" website, Dell
 21 reported:

22 Earlier this month, sites like Ars Technica and ZDNet blogged about NVIDIA's
 23 statement regarding a potential issue with some of NVIDIA's Graphics Processing
 24 Units (GPUs) used in notebooks. According to NVIDIA, these affected GPUs are
 25 experiencing higher than expected failure rates causing video problems. Though
 26 this issue is not unique to Dell, some of these affected GPUs are used in certain
 Dell laptops. That's why I wanted to take a few minutes here to explain the issue
 and to let customers know what to do next.

The issue is a weak die/package material set, which may fail with GPU
 temperature fluctuations. If your GPU fails, you may see intermittent symptoms
 during early stages of failure that include:

- Multiple images
- Random characters on the screen
- Lines on the screen
- No video

Dell recommends that you flash your system BIOS (see links in the table below). Each of these BIOS updates listed in the table below modifies the fan profile to help regulate GPU temperature fluctuations. Note: if you are already experiencing video-related issues like the bullet points above, updating the BIOS will not correct them. Dell will provide support for customers who have experienced GPU failure according to the terms of the system warranty.

These BIOS updates will help reduce the likelihood of GPU issues. New systems are being shipped with the updated BIOS revisions.

41. Dell subsequently updated its blog posting on this issue in response to consumer concerns. The following updates were posted sometime after July 25, 2008:

Update: As Direct2Dell reader foduekid noted, the A09 BIOS update for the XPS M1530 was made available yesterday after I published this blog post. I've updated the table above with the link.

Update 2: I'm getting e-mails and comments that are similar to those of Direct2Dell readers like Customer, fr and barryd. Like I mentioned in one of my responses, this will not be the only blog post on this topic. When I have new details to share, I will share them here. Several of you have expressed concern over potential battery life issues. The reality is that these BIOS updates will not have any noticeable effect on battery life or overall system performance. These updates do not make the cooling fan run all the time. The fan may cycle on more frequently, but when it does, it will run at half or quarter speed.

Update 3: Since Kara Krautter unveiled the Vostro 2510 on the Small Business blog yesterday, we've gotten some questions about it since it uses an NVIDIA GPU. Take a look at some of the comments in the Vostro 2510 Engadget post to see what I'm talking about. The Vostro 2510 will ship with the latest BIOS updates.

If you need help flashing your system BIOS or experience any of the video-related issues listed above, please contact Dell Technical Support. Our teams are committed to working with affected customers to resolve issues on a case-by-case basis.

42. Dell also offered a BIOS update. But this does not remedy the problems with the NVIDIA GPUs. Even with Dell's fix, users still report degraded video performance and video artifacts.

43. On or about August 25, 2008, NVIDIA held its yearly NVISION convention at the San Jose Centre for Performing Arts. According to news reports, angry consumers protested

outside the NVISION show to highlight NVIDIA's failure to fully disclose known problems with its defective GPUs. An NVIDIA spokesman said to reporters:

The truth is... our obligations to our partners limit what we can say. We need to leave announcements to our partners like Dell and HP. ... I know there's frustration, and it would make my job easier if I could give out the facts that I know, but we have obligations to our partners. We discuss it constantly, and *the company would like to be more upfront about this – but we can't be.*

44. Notably, NVIDIA has done nothing to extend any kind of warranty or replacement service for Class Computers or the defective parts they contain.

45. On or about October 9, 2008, another computer manufacturer, Apple, admitted its notebook computers containing NVIDIA GPUs were experiencing defects:

Symptoms

In July 2008, NVIDIA publicly acknowledged a higher than normal failure rate for some of their graphics processors due to a packaging defect. At that same time, **NVIDIA assured Apple that Mac computers with these graphics processors were not affected. However, after an Apple-led investigation, Apple has determined that some MacBook Pro computers with the NVIDIA GeForce 8600M GT graphics processor may be affected.** If the NVIDIA graphics processor in your MacBook Pro has failed, or fails within two years of the original date of purchase, a repair will be done free of charge, even if your MacBook Pro is out of warranty.

What to look for:

- Distorted or scrambled video on the computer screen
- No video on the computer screen (or external display) even though the computer is on

Specific products affected:

- MacBook Pro 15-inch and 17-inch models with NVIDIA GeForce 8600M GT graphics processors
 - MacBook Pro (17-Inch, 2.4GHz)
 - MacBook Pro (15-Inch, 2.4/2.2GHz)
 - MacBook Pro (Early 2008)
- These computers were manufactured between approximately May 2007 and September 2008

Products Affected

MacBook Pro, models with NVIDIA GeForce 8600M GT graphics processors

46. Apple also offered to “evaluate” and possibly repair only those notebook computers exhibiting the symptoms listed above.

47. Thus, Defendants sold consumers defective desktop and notebook computers, causing substantial harm and injury to Plaintiff and to Class members. Defendants refuse to remedy the harm customers suffered by substituting functional desktop and notebook computers for the defective computers consumers purchased. Defendants also refuse to replace the defective NVIDIA GPUs and MCPs in consumers’ desktops and notebooks with properly engineered, manufactured, and functioning graphics chips.

48. Defendants’ *only* “solution” is to spin the computer fans more frequently or continuously. This grossly inadequate “remedy” degrades battery life, system performance, creates major noise in the defective computers, and does not solve the actual problem. Instead this stopgap measure helps ensure the Class Computers will fail at some point during their useful life, but potentially *after* the warranty period expires, leaving consumers with a defective computer and no remedy at all. Finally, even after using the “remedy,” video performance is still degraded due to unacceptably high heat, part failures, and failure of the BIOS update to fix corrupted computer displays.

49. And for the desktops, there is no solution or fix at all, except to wait for the computer to fail to boot or display video. As alleged, HP’s inadequate warranty “enhancement” will be discontinued in December 2009. Thus approximately one year from now, consumers who own these desktop computers will be left without *any* remedy – even if their computers fail due to defect, a defect known and admitted to by NVIDIA and HP.

FIRST CAUSE OF ACTION

Unlawful, Unfair and Fraudulent Business Practices, California Business and Professions Code §§ 17200 *et seq.* (Against All Defendants)

1 50. Plaintiff, on behalf of itself and all Class members, incorporates and realleges
2 paragraphs 1-49 as though fully set forth herein.

3 51. Defendants' practices as alleged in this Complaint constitute unlawful, unfair, and
4 fraudulent business practices under the UCL, Bus. & Prof. Code §§ 17200 *et seq.*

5 52. Defendants committed unlawful business practices by:

- 6 a. as alleged herein, engaging in conduct that violates the Magnuson-Moss
7 Warranty Act, 15 U.S.C. §§ 2301 *et seq.*; and
8 b. as alleged herein, engaging in conduct that breached express and implied
9 warranties.

10 53. Defendants committed unfair business practices by:

- 11 a. engaging in conduct where the utility of such conduct, if any, is
12 outweighed by the gravity of the consequences to Plaintiff and to other
13 Class members;
14 b. engaging in conduct that is immoral, unethical, oppressive, unscrupulous,
15 or substantially injurious to Plaintiff and to other Class members; and
16 c. engaging in conduct that undermines or violates the Magnuson-Moss
17 Warranty Act, 15 U.S.C. §§ 2301 *et seq.* and the other laws detailed
18 herein.

19 54. Defendants committed fraudulent business practices by engaging in conduct that
20 was and is likely to deceive customers acting reasonably under the circumstances. Defendants'
21 fraudulent practices includes, without limitation, failing to disclose or concealing from Plaintiff
22 and from Class members at the time of sale, repair and diagnosis that the Class Computers were
23 defective in materials and workmanship and that the Class Computers were likely to fail during
24 their useful life.

25 55. Plaintiff and Class members have suffered injury in fact and have lost money and
26 property as a result of Defendants' unlawful, unfair, or fraudulent practices, in that, among other
things:

- a. Class members would not have bought or leased the Class Computers at the price that they did;
- b. the Class Computers have a lower market value than they otherwise would have if not for the defective NVIDIA GPUs;
- c. Class members have paid for repairs and replacement parts that they would not and should not have paid for; and
- d. Class members were denied their right to receive property free from defect.

56. Plaintiff, on behalf of itself and Class members, seeks declaratory and injunctive relief, restitution and disgorgement of all profits obtained from the unfair competition alleged herein and other relief as appropriate.

SECOND CAUSE OF ACTION

Breach of Express and Implied Warranties (Against All Defendants)

57. Plaintiff, on behalf of itself and all Class members, incorporates and realleges paragraphs 1-56 as though fully set forth herein.

58. Defendants expressly gave warranties by specific words or actions to Plaintiff and Class members, both through the issuance of its written warranty accompanying all its computers and/or its advertising campaigns, product packaging and literature and sales professionals used to promote the sale and use of these Class Computers. Defendants warranted to the general public, including Plaintiff and Class members, these Class Computers were effective, free from material defects in materials and/or workmanship and fit for their intended use.

59. Defendants also impliedly warranted to members of the general public, including Plaintiff and Class members, these computers were of merchantable quality, would pass without objection in the trade or business, were free from material defects and reasonably fit for the use for which they were intended by Defendants, namely, for the purpose of mobile computing and other related activities.

1 66. Plaintiff, on behalf of itself and all Class members, incorporates and realleges
2 paragraphs 1-65 as though fully set forth herein.

3 67. Plaintiff and Class members are “consumers” within the meaning of the
4 Magnuson-Moss Act, 15 U.S.C. § 2301(3).

5 68. Each Defendant is a “supplier” and “warrantor” within the meaning of the
6 Magnuson-Moss Act, 15 U.S.C. § 2301(4)-(5).

7 69. The defective computers at issue are “consumer products” within the meaning of
8 the Magnuson-Moss Act, 15 U.S.C. § 2301(1).

9 70. Defendants’ written affirmations of fact, promises and/or descriptions, as alleged
10 herein, are each a “written warranty” within the meaning of the Magnuson-Moss Act, 15 U.S.C.
11 § 2301(6).

12 71. For the reasons detailed herein, Defendants refuse to recognize or honor their
13 written warranties. Defendants breached their written warranties as the Class Computers in
14 question failed to perform as represented by Defendants, and thereafter when Defendants refused
15 to honor such warranties. Defendants’ conduct caused damages to Plaintiff and to Class
16 members.

17 72. The amount in controversy of each Class member’s individual claim meets or
18 exceeds the sum or value of \$25. In addition, the amount in controversy meets or exceeds the
19 sum or value of \$50,000 (exclusive of interest and costs) computed on the basis of all claims to
20 be determined in this suit.

21 73. Resorting to any informal dispute settlement procedure or affording Defendants a
22 reasonable opportunity to cure its breach of written warranties is unnecessary or futile.
23 Defendants knew, reasonably should have known, or were reckless in not knowing of the
24 defective NVIDIA GPUs and MCPs and their inability to perform as warranted, but nevertheless
25

1 failed to rectify the situation or failed to disclose it to Plaintiff and Class members. Further,
2 Plaintiff has provided Defendants with a written request to cure such breaches. Any remedies
3 available through informal dispute settlement procedures would be inadequate under the
4 circumstances. Accordingly, any requirement under the Magnuson-Moss Act or otherwise that
5 Plaintiff resort to informal dispute settlement procedures or afford Defendants a reasonable
6 opportunity to cure its breach of written warranties is excused or has been satisfied.

7 74. As a result of Defendants' breach of written warranties, Plaintiff and Class
8 members have sustained damages and other losses in an amount to be determined at trial.
9 Plaintiff and Class members are entitled to recover damages, specific performance, diminution in
10 value, costs, attorneys' fees, rescission, and other relief as is deemed appropriate.

11 **FOURTH CAUSE OF ACTION**

12 **Money Had and Received and Unjust Enrichment** 13 **(Against All Defendants)**

14 75. Plaintiff, on behalf of itself and all Class members, incorporates and realleges
15 paragraphs 1-74 as though fully set forth herein.

16 76. For the reasons set forth above, Defendants have profited unjustly from their sale
17 of defective Class Computers and their failure to repair them as the law requires, and it would be
18 unfair for Defendants to retain the profits they have unjustly earned at the expense of Plaintiff
19 and the Class.

20 77. Due to Defendants' illegal conduct, Plaintiff and Class members conferred
21 economic benefits on Defendants. Defendants received and retained these benefits under such
22 circumstances that it would be inequitable and unconscionable to permit them to retain some or
23 all of these benefits without returning their reasonable value to Plaintiff and to Class members.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiff, both individually and on behalf of all Class members, prays for judgment against defendants, and each of them, jointly and severally, as follows as appropriate for the particular cause of action:

- A. an order certifying the Plaintiff Class and appointing Plaintiff and its counsel to represent the Class;
- B. declaratory, equitable and injunctive relief;
- C. actual, direct, incidental, consequential, statutory and exemplary damages;
- D. pre- and post-judgment interest;
- E. attorney's fees and costs of suit pursuant to, *inter alia* California Code of Civil Procedure § 1021.5 and 15 U.S.C. §§ 2301 *et seq.*
- F. for such other and further relief this Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on all claims so triable.

Dated: October 27, 2008

DOYLE LOWTHER LLP
WILLIAM J. DOYLE II
JOHN A. LOWTHER
JAMES R. HAIL

/s/ John A. Lowther

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